Supreme Court, U.S.
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No. 01-1568

IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, ROBERT J. REGUS, and MICHAEL G. COOPER,

Petitioners,

v.

CHESTER L. LAMBERT, JANICE ELAINE MOWREY as Administratrix of the Estate of WILLIAM E. MOWREY, and JAMES M. HEATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to decide a hypothetical issue concerning the standard for "comparator evidence" in a disparate treatment discrimination case where (a) the issue was of so little importance to Respondents that they did not raise it before the Court of Appeals; (b) the Court of Appeals' decision contained no substantive discussion of the "comparator" issue; (c) the jury instruction that petitioners now wish to challenge merely recited the well-established standard already laid down by this Court; and (d) Respondents, at trial, only tangentially relied on "comparator evidence?"

2. Whether this Court should grant certiorari to decide an issue concerning qualified immunity, where Petitioners failed to argue in the Eleventh Circuit that the District Court used the wrong standard or procedure to determine qualified immunity and the Eleventh Circuit followed established law?

PARTIES TO THE PROCEEDINGS

Petitioners' statement of the parties to the proceedings below is correct. William Mowrey died in January 2002. The administrator of his estate, Janice Elaine Mowrey, has now filed unopposed motions to substitute herself on behalf of Mr. Mowrey in the District Court and Court of Appeals in this case and the District Court has entered an order substituting her for Mr. Mowrey.

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STATEMENT OF THE CASE

I. FACTS

Petitioners' statement of facts misstates or ignores the principal evidence that supported the jury's verdict. Respondents will therefore restate certain key facts.

Respondents are three white Fulton County managers who were singled out, publicly disciplined and made scapegoats in the news media in connection with public allegations regarding anonymously written racial slurs and vandalism at Fulton County's Big Creek Water Treatment Facility (PE 41, 7, 8, 1, 3, 5).[1] Respondent Lamar Lambert ("Lambert") was a civil engineer responsible for the North Fulton Water System and water and sewer maintenance (Doc. 184 - pp. 521-22).[2] Respondent William Mowrey ("Mowrey") was Area Construction Supervisor, Operating Manager for South and North Fulton County waste water treatment plants. (Doc. 183 - pp. 223-26). Respondent James Heath ("Heath") was acting supervisor of the Big Creek Waste Water Treatment Plant. (Doc. 185 - pp. 744, 747). All three managers encountered the problem of reacting to anonymous

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1. Respondents will refer to the record as they did in the Court of Appeals. "PE" means "Plaintiffs' Exhibit" and is followed by the referenced exhibit number. The collected exhibits were not given a docket number in the District Court record.

2. Respondents will refer to the trial transcript as they did in the Court of Appeals. "Doc." refers to the docket sheet entry number from the District Court record. The trial transcript was entered in ten volumes from docket numbers 182 to 191. Following the docket number for the volume in which the citation appears is the page number for the particular citation.

racial slurs that were "found" at the Big Creek Waste Water Treatment Plant by two black employees, David Parker and Arthur Glass, who used these occasions as the basis for bringing their complaints of race discrimination. This led to the involvement of numerous supervisory and management level employees, including Respondents, in investigating and attempting to stop the anonymous slurs. Ultimately, Petitioners singled out Respondents for punishment for the events surrounding the anonymous slurs and publicly punished them. *See generally*, *Lambert v. Fulton County*, 253 F.3d 588, 590-93 (11th Cir. 2001).

Petitioners overlook the contents of Fulton County Director of Equal Employment Opportunity, Michael Cooper's ("Cooper"), two reports to County Manager Robert Regus ("Regus") concerning the incidents at Big Creek (PE 41, 7), which recommend Respondents' discipline, and Cooper's admission that the two reports selectively excluded certain material facts while including others. (Doc. 188 - pp. 1589-92). They omit Regus' admission that when Cooper told Director of Public Works, Frank Bockman, he was "looking at it from a white man's perspective and that he should look at it from the perspective of a black man who has had to work for a white man all his life," he injected race into the meeting in which Respondents' discipline was contemplated (PE 8; Doc. 188 - p. 1667). Petitioners failed to include in their facts Regus' admission that, at the time that he disciplined Respondents, he knew that Cooper's report was riddled with inaccuracies and misstatements and that Cooper himself was "biased." (PE 8; Doc. 188 - pp. 1602, 1606, 1607, 1610, 1624, 1633). Despite this knowledge, Regus followed the exact same County disciplinary policies that Cooper recommended, for the first and only time he used these policies in his career as County Manager. (PE 1, 3, 5, 7, 64; Doc. 188 - p. 1651).

Petitioners also omitted the fact that Regus, after he received Cooper's report, but before he disciplined Respondents, also reviewed Fulton County's EEOC Position Statement regarding David Parker and Arthur Glass' charges of discrimination, which completely vindicated Respondents' handling of the situation at Big Creek. (PE 40; Doc. 188 - p. 1610). Petitioners omit evidence that Regus reviewed only select material prior to disciplining Respondents, failed to interview Respondents (Doc. 188 - pp. 1634-1638), and refused to review or ignored material that would have vindicated them. (Doc. 188 - pp. 1589-92). Finally, while Petitioners argue that different employees were not in the same "chain of command," Regus admitted that he had authority to discipline all employees referenced in their statement of the case. (Doc. 188 - p. 1621).

Petitioners fail to include in their petition Cooper's admission at trial that his report was incomplete, inaccurate and biased:

> Yes, you can say I left out a whole bunch of things, if you want to put it that way. I didn't give them all the tapes, put what everybody said.

(Doc. 188 - p. 1589). Cooper admitted he left out material facts from his report. (Doc. 188 - p. 1592). He admitted that he left out of his report the fact that a witness, James Lucas, was offered a bribe by Parker to help him bring his claim. (Doc. 188 - p. 1590-91). He admitted that he left out Glass' statement that Parker conspired to plant cocaine in Respondent Heath's truck. (Doc. 188 - p. 1591). He admitted that he left out evidence from Lucas that Parker or Glass had, in all probability, actually cut their own brake line. *Id.* He admitted he failed to give any weight to the fact that all

but one of the racial slurs were "discovered" by Parker or Glass. *Id.* He admitted that he omitted the written statements of Respondents in which they recounted in detail their efforts to stop the racial slurs, investigate or take steps to eliminate any hostile work environment. (DE 103, 105; PE 35; Doc. 188 - p. 1591). He admitted he failed to mention that Parker's letter and Respondent Lambert's response both were copied to Mozelle Acey and Fred Artis, and that neither of them took any action on that matter. (Doc. 188 - p. 1591-92). He admitted he failed to mention that supervisor Brown stated that he saw employees smoke pot on the job and tolerated racial slurs and failed to report any of this to his supervisors. (Doc. 188 - p. 1592).

On pages 13 and 14 of their Petition, Petitioners state that Cooper's report "did not recommend that any particular individuals be disciplined." In fact, Cooper's report names each respondent by name, position and race, then at its conclusion states:

> . . . I strongly recommend immediate disciplinary action consistent with violations of personnel regulations. Disciplinary actions should not be limited just to employees involved but should also include supervisors, middle and upper management and department heads. (PE 8).

Petitioners omit evidence gathered by Bockman and Acey in a separate investigation that was reviewed by Regus and did not find fault with Respondents and found that Parker attempted to bribe a witness and conspired to plant drugs in supervisor Heath's vehicle. (PE 37, 38, 39; Doc. 186 - pp. 1155-56).

In short, Petitioners failed to acknowledge that Cooper admittedly lied in his report and that Regus, knowing that Cooper lied and knowing that Cooper was biased and injected race into the proceedings, nonetheless adopted his recommendations. (PE 1, 3, 5, 7, 8, 41; Doc. 188 - p. 1633, 1658). Although Regus subsequently gave Cooper a private written reprimand, ignoring County policy which required Regus to terminate Cooper, (PE 8; PE 45 - p. 60, Article 7; Doc. 188 - pp. 1632-33, 1658), Regus publicly disciplined Respondents, ignoring policy which gave him the discretion to discipline them much less harshly. (PE 45 - p. 66; PE 47, 48). Regus chose the harsher sanctions of suspension and demotion for Mowrey and Heath and termination for Lambert and delivered them in a way that was public and humiliating (PE 1, 3, 5, 46, 47, 48) in order to "serve up" three white scapegoats to local media.

II. PROCEEDINGS BELOW

Petitioners did not raise any issue concerning the District Court's jury instruction regarding comparators on appeal in the Eleventh Circuit, nor did Petitioners argue that the District Court had allowed the jury to decide the qualified immunity issue.

A. The Comparator Issue Was Not Raised On Appeal.

Nowhere in their Brief to the Eleventh Circuit did Petitioners mention the District Court's jury instruction concerning comparators or the appropriate standards for determining comparators. The issue also was not mentioned in their Reply Brief. Petitioners' Brief and Reply Brief discussed facts relating to Ms. Acey, Mr. Cooper and

Mr. Brown in arguing that there was no evidence to support the jury's verdict. (Brief of Appellants, Eleventh Circuit Court of Appeals, pp. 41, 45-46; Reply Brief of Appellants, Eleventh Circuit Court of Appeals, pp. 12-14)

The Eleventh Circuit briefly discusses the comparator issue in the section of its opinion titled "Sufficiency of the Evidence." *Lambert v. Fulton County*, 253 F.3d 588, 594-95 (2001). In a lengthy paragraph outlining the evidence which supported the verdict, the Court states,

> At the same time, Regus treated similarly situated black employees, namely Acey and Brown, more leniently than the white plaintiffs and imposed no real discipline on Cooper even though Cooper's misconduct, unlike that of plaintiffs, was willful.

253 F.3d at 595. This is the entire discussion of comparator evidence. There is no discussion of the jury instruction or the proper standard for determining whether comparators are similarly situated anywhere in the Eleventh Circuit's opinion, because Petitioners' chose not to raise it.

B. Petitioners Failed To Raise On Appeal The Qualified Immunity Argument Now Made.

Petitioners raised the issue of qualified immunity in the Court of Appeals by way of factual argument that Respondents had failed to show "by a preponderance of the evidence that Regus' and Cooper's official acts violated law that was clearly established at the time they acted." (Brief of Appellants, Eleventh Circuit Court of Appeals, p. 48). Petitioners made no arguments that the District Court had applied an improper standard or procedure in determining

qualified immunity. Petitioner's argued only that the evidence did not support the decision. (Brief of Appellants, Eleventh Circuit Court of Appeals, pp. 47-52). In their Reply Brief, Petitioners stated,

> While Defendants do not dispute that the District Court may, when appropriate, use written interrogatories to the jury to resolve disputed factual issues prior to ruling on qualified immunity, the District Court erred by doing so in this case because there were no factual disputes from which the jury reasonably could have concluded that Regus and Cooper intentionally discriminated against Plaintiffs.

(Reply Brief of Appellants, Eleventh Circuit Court of Appeals, p. 15). Petitioners again did not contest the standard or procedures applied by the District Court; they argued only that there were no facts in dispute concerning qualified immunity, so the Court should have found for them prior to submitting the issue to the jury.

Petitioners failed to inform this Court that the jury did not in fact decide the issue of qualified immunity, but only the question of whether or not Petitioners had intentionally discriminated against Respondents based on their race. (Doc. 133).

REASONS FOR DENYING THE WRIT

I. The District Court's Jury Instruction Concerning Comparators Was Not Properly Raised On Appeal, Followed Existing Supreme Court Precedent, Properly Stated The Standard, And Even If Erroneous Would Not Be A Basis For Reversal.

A. The Issue Of The Proper Standard For Comparator Evidence As Articulated In The District Court's Jury Instruction Was Not Raised On Appeal.

As discussed above in the section labeled "Proceedings Below," Petitioners did not raise on appeal the issue concerning the District Court's instruction on comparators or the standard for determining whether comparators are similarly situated. In their brief in the Court of Appeals, Petitioners did not discuss the District Court's jury instruction which they now contest, the "nearly identical" standard for comparators which they now propose or the proper standard for comparator evidence. The Eleventh Circuit therefore did not address the issue or discuss it in its opinion.

This Court generally will not issue a writ of certiorari to consider an issue that has not been presented and ruled on below. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997); *Duignan v. United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 568 (1927); *United States v. Lovasco*, 431 U.S. 783, 788, n.7, 97 S. Ct. 2044, 2048, n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589 (1975). This Court has noted "the value to this Court of a fully developed factual and legal record upon which to base decisions" in determining that certiorari should not be

granted where an issue has not been presented to the lower courts. *Adams*, 520 U.S. at 92. There is no reason to depart from this general practice in this case. The issue concerning standards for comparators which Petitioners seek to present to this court was not presented or ruled on below. As the record below is not fully developed on this issue, certiorari should not be granted to consider it.

B. This Court Has Already Decided The Issue Petitioners Seek To Raise.

Petitioners argue that this Court should issue a writ of certiorari because the District Court instructed the jury on an improper standard concerning comparators. Petitioners state:

> In the instant case, the court permitted the jury to consider the treatment of Acey and Cooper as evidence of disparate treatment if they found Acey or Cooper to have engaged in misconduct that was "nearly identical or of comparable seriousness" to Respondents.

(Petition for Writ of Certiorari, p. 25). Petitioners argue that this Court should issue a writ of certiorari to determine the appropriate standard for comparators. However, as the Petitioners note (Petition for Certiorari, pp. 22-23), this Court has already addressed this very issue. In *McDonald v. Sante Fe Transportation Company*, 427 U.S. 273, 283-84, 96 S. Ct. 2574 (1976), the Court held:

> Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an

> allegation that other "employees involved in acts against (the employer) of comparable seriousness . . . were nevertheless retained . . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 U.S., at 804, 93 S.Ct. at 1825.

Id. at 283, n.11, 2580, n.11. *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 1823 (1973). The District Court employed the very language used in *McDonald* and *McDonnell Douglas*, regarding "comparable seriousness," to instruct the jury in this case. (Doc. 190 - p. 1872). The Court should not grant certiorari to consider a question on which it has already specifically ruled. Particularly in the area of statutory interpretation, where Congress can correct any improper interpretation, the Court has been reluctant to depart from the principle of *stare decisis*. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S. Ct. 2363, 2370 (1989) (*stare decisis* has "special force" in statutory interpretation); *Faragher v. City of Boca Raton*, 524 U.S. 775, 804, n.4, 118 S. Ct. 2275, 2291, n.4 (1998). The District Court's instruction used the appropriate language from this Court's precedent. Certiorari should not be granted to reconsider that statutory interpretation.

C. This Case Does Not Provide An Appropriate Vehicle For Deciding The Comparator Issue Because The Finding Of Discrimination Was Based Primarily On Other Compelling Evidence Of Discrimination.

When the overall instructions accurately express the law, reversal is not required because isolated clauses may be confusing, technically imperfect or otherwise subject to criticism. Reversal is only required if the reviewing court is left with "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *McElroy v. Firestone Tire & Rubber, Co.*, 894 F.2d 1504, 1509 (11th Cir. 1990). In addition to the charge now belatedly challenged by Petitioners, the Court repeatedly instructed the jury that it must find intentional race discrimination. (Doc. 190 - pp. 1870, 1871). The Court's charge as a whole clearly requires that the jury find intentional discrimination and makes clear that the jury should not second guess the employer. (Doc. 190 - pp. 1869-72). The jury was asked special interrogatories and answered them with a finding that Mr. Regus and Mr. Cooper intentionally discriminated against the respondents. (Doc. - pp. 1885, 1886).

There was a substantial amount of evidence of discrimination in addition to the disparate treatment of Mr. Cooper, Mr. Brown and Ms. Acey. The principal evidence against both Mr. Regus and Mr. Cooper was Mr. Cooper's biased report which identified Respondents by race and omitted or distorted substantial parts of the evidence to the detriment of Respondents. The omissions and distortions uniformly favored African American employees and disfavored Caucasian employees. Mr. Cooper also specifically introduced race into discussions of the matter.

Mr. Regus was present for Mr. Cooper's race based remarks and relied on Mr. Cooper's report, despite knowing of Cooper's racial bias and knowing his report was false. Regus followed Cooper's recommendations of discipline to the letter and to the person, publicized the report to the media and the County Commissioners, then buried the Bockman report, which exonerated Respondents and accused Parker and Glass of manufacturing the racial incidents themselves. *See* "Statement of the Case" above and *Lambert*, 253 F.3d at 590-595 (stating facts of case and reviewing evidence which supported the verdict).

Unlike cases which rely exclusively on comparator evidence, the issue of comparators is not the central issue in this case. Indeed as noted above, in the Court of Appeals, Petitioners did not even raise the issue on which they now petition for the writ of certiorari. Consequently, it has not received the factual and legal development that might be helpful to this Court in resolving the issue.

This case would be an inappropriate vehicle to resolve any issue concerning comparator evidence because the evidence in this case does not follow the common format of comparator cases. In this case, there are at least three individuals who were not significantly disciplined to whom Respondents compared their treatment. The evidence showed a pattern of Caucasian employees being disciplined, no matter what their position, and African-American employees not being disciplined. Furthermore, the discipline of employees mirrored the recommendations in Cooper's report. The pattern of discipline, particularly as combined with the racially biased recommendations of Cooper's report, was relevant to this case. This was not a case where a significant

part of the evidence was a comparison of one plaintiff to one comparator as it is in the typical case where comparator evidence is at issue.

II. The Eleventh Circuit Followed Established Law Concerning Qualified Immunity.

The Supreme Court ordinarily refuses to grant a petition for certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioner's argument does not state that the Eleventh Circuit misstated the law and in effect asks this Court to review the Eleventh Circuit's proper statement of the law as it was applied to the facts of this case. *See* discussion in section titled "Proceedings Below."

Petitioners state that the qualified immunity determination should be decided by the court. (Petition for Writ of Certiorari, p. 27). The Eleventh Circuit noted that it reviewed "*de novo* the denial of qualified immunity." *Lambert*, 253 F.3d at 596. It then stated that the District Court had properly denied qualified immunity. *Id.* at 597. Thus, the Eleventh Circuit recognized that the District Court, not the jury, had ruled on the issue of qualified immunity.

Petitioners' argument that the District Court submitted the qualified immunity issue to the jury is erroneous on its face. The District Court decided the issue of qualified immunity as a matter of law. It based that decision in part on the jury's finding of fact that Mr. Regus and Mr. Cooper intentionally discriminated. *Id.* at 597. Petitioners stated below that

> While Defendants do not dispute that the District Court may, when appropriate, use written interrogatories to the jury to resolve disputed factual issues prior to ruling on qualified immunity, the District Court erred by doing so in this case because there were no factual disputes from which the jury reasonably could have concluded that Regus and Cooper intentionally discriminated against Plaintiffs.

(Reply Brief of Appellants, Eleventh Circuit Court of Appeals, p. 15). In essence, Petitioners are asking this Court to resolve a **factual dispute, not a legal issue.** There were facts in dispute in this case, and the District Court properly decided the qualified immunity issue using the facts as determined by the jury. The Eleventh Circuit then reviewed this decision *de novo*. The District Court and indeed the Court of Appeals properly stated the law, as acknowledged by Petitioners below. Petitioners simply ask this Court to review the Eleventh Circuit's application of the law to the facts of this case.

Petitioners discuss at length the facts relating to qualified immunity in an apparent attempt to have this Court redetermine the issue. As noted above, Petitioners ignore many facts that support the verdict and impermissibly draw inferences in favor of themselves from the facts they state. Petitioners cite no conflict with established law or between circuits on any legal point related to qualified immunity. Petitioners have identified no legal issue relating to qualified immunity sufficient for this Court to grant a writ of certiorari.

CONCLUSION

For the reasons cited above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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